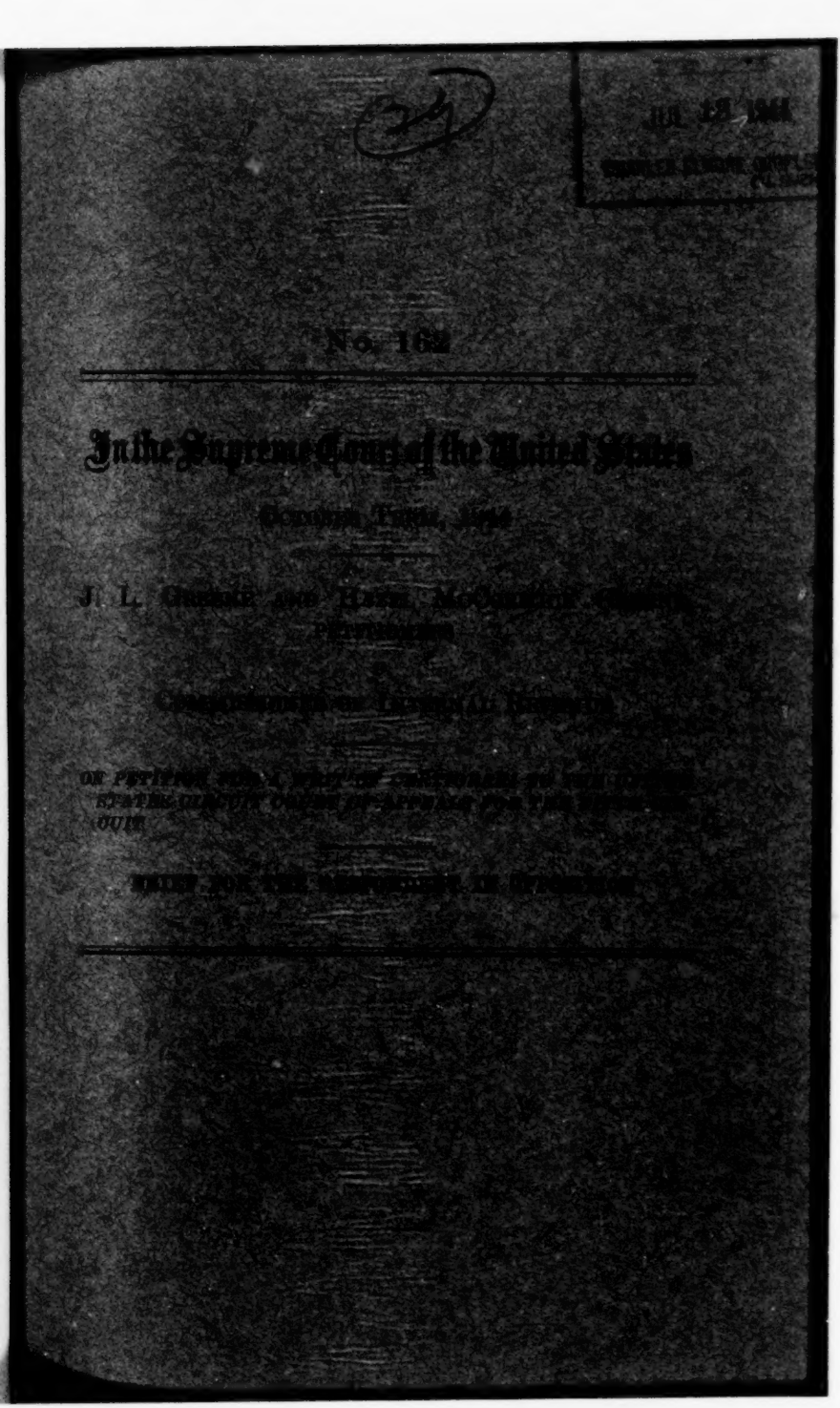

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 162

L. GREENE AND HAZEL MCCORMICK GREENE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 39–45) is not reported. The opinion of the Circuit Court of Appeals (R. 100–105) is reported at 141 F. 2d 645.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1944 (R. 105). The petition for a writ of certiorari was filed on June , 1944. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below properly refused to disturb the Tax Court's conclusion that the taxpayer held oil and gas properties primarily for sale to others in the course of his business within the meaning of Section 117 (a) (1) of the Revenue Act of 1938 and the Internal Revenue Code.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (g) *Capital Losses.*—
>
> (1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.
>
> (2) *Securities Becoming Worthless.*—If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this title, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.
>
> * * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this title—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l);

* * * * *

(3) *Short-Term Capital Loss.*—The Term "short-term capital loss" means loss from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such loss is taken into account in computing net income;

* * * * *

(d) *Limitation on Capital Losses.*—

* * * * *

(2) *Other Taxpayers.*—In the case of a taxpayer other than a corporation, short-term capital losses shall be allowed only to the extent of short-term capital gains.

* * * * *

Corresponding provisions of the Internal Rev
enue Code are identical.

STATEMENT

The statement of facts set forth below is take
from the memorandum opinion of the Tax Cou
(R. 40–43):

Taxpayers in this consolidated action are hus
band and wife, who, during the years 1938 an
1939, were domiciled in the State of Texas. The
filed separate individual income tax returns wit
the Collector of Internal Revenue at Dalla
Texas, on the community property basis. Th
husband, J. L. Greene, was the manager of th
community and for convenience will be herein
after referred to as taxpayer. He has resided i
Midland, Texas, for approximately 13 years
When he first moved to Midland he was an oi
scout for the Shell Oil Company but due to th
depression was laid off in 1931. Since that dat
he has engaged in the oil business at Midlan
where he has maintained an office for a greate
portion of the time. (R. 40.)

Taxpayer has acted as a broker, buying an
selling oil and gas properties for others and re
ceiving compensation for such services. He hold
a brokerage license from the State of Texas. I
operations of this sort, the purchasers, usuall
oil companies, provide necessary funds, and th
purchases are made by taxpayer on behalf of th
companies. Taxpayer received as commission
for such services the sums of $12,387.06 an

$5,185.63 for the years 1938 and 1939, respectively. In 1938, nine separate transactions gave rise to the commission income and in 1939 eight separate transactions were involved. (R. 40–41.)

Taxpayer's returns for the years in question disclose income from producing oil properties in the amounts of $354.59 for 1938 and $51.28 for 1939, dividends of $300 for each of those years, and interest of $10 for 1938 (R. 41).

Aside from his activities as a broker, taxpayer acquired and dealt with oil properties on his own behalf. In 1933 and thereafter, he purchased for himself a number of leases and mineral interests, and at the time of the trial he owned at least 100 such properties. Taxpayer was desirous of accumulating some producing properties. He had had some wells drilled over a period of years and was definitely in the oil business during the years in question. He had not acquired and did not have any properties that he would not sell at any time if he thought he could obtain what they were worth. (R. 41.)

Taxpayer was widely known among oil men, landowners, and individuals in the general area of Midland, Texas.[1] He spent most of his time

[1] The taxpayer admitted that (R. 59) he was generally known among the oil men in the Midland area of Texas and that (R. 62) his name appeared on blotters and certain advertisements around Midland "as an oil lease dealer or something of that nature." Although the taxpayer denied authorizing the printing of the blotters, this seems to be some indication of how he was regarded in the community.

at his office in Midland unless he was out for the purpose of acquiring oil and gas properties. People knew that he had an office where he transacted business. In the sale of the properties in question, some of the parties came to him and he went to others. He did not utilize any particular method of publicizing the fact that he had oil and gas properties for sale. (R. 41.)

None of the property sold in 1938 and 1939 had been drilled or developed by taxpayer. He was not financially able to develop some of the leases he owned and because of the nature of many of them, he did not want to do so. Taxpayer has drilled 11 wells. He has abandoned some properties because they became worthless. (R. 41–42.)

In 1938 taxpayer sold 18 oil and gas leases and interests (including one fee property) at a gross profit of $22,057.20. These 18 properties had been acquired as follows: one in each of the years 1933 and 1934, five in 1935, three in each of the years 1936 and 1937, and five in the year 1938. (R. 42.)

In 1939, taxpayer sold 19 gas and oil leases and interests (including one fee property) at a profit of $15,152.41. These 19 properties had been acquired as follows: one in 1934, two in 1935, four in 1936, three in 1937, four in 1938, and five in 1939. They and the properties which were sold in 1938 were non-producing. (R. 42.)

When the properties were acquired, taxpayer did not know whether they would be held for investment or speculation, drilled, "farmed out" for others to drill, traded or otherwise disposed of, forfeited or abandoned (R. 42).

Taxpayer pursued the policy of buying "wildcat" properties, drilling some of them, watching drilling and developing activities in their vicinity, holding certain properties, selling others when his best judgment so dictated, and abandoning properties when they became worthless (R. 42).

The Tax Court concluded that the activities of taxpayer involving the acquisition and sales of oil and gas properties constituted a trade or business in the years in question. He incurred and paid ordinary and necessary business expenses in connection with his trade or business of $2,701.47 for 1938 and $1,968.68 for 1939. (R. 42.)

Having found that the taxpayer held the oil properties primarily for sale (Sec. 117 (a) (1)), the Tax Court concluded (R. 44) that the business expenses were deductible but that a capital loss, which admittedly had been sustained, could not be offset against the business profits, for such profits constituted ordinary income and not capital gain, since the properties sold were not "capital assets" as defined in Section 117 of the Revenue Act of 1938 and the Internal Revenue Code. The Circuit Court of Appeals affirmed (R. 105).

ARGUMENT

The circuit court of appeals properly refused to disturb the conclusion of the Tax Court that (R. 42) the activities of the taxpayer in acquiring and selling oil properties constituted a trade or business in the years here in question and that (R. 44) the oil properties were held primarily for sale to others within the meaning of Section 117 (a) (1) of the Revenue Act of 1938 and the Internal Revenue Code, *supra*, p. 3. The Tax Court examined the evidence and, after balancing and weighing the factors involved, concluded that (R. 43) there was "a great preponderance of probability in favor of a disposition by sale over retention for investment purposes." Since the sales activities here clearly predominated the investment activities with respect to the oil properties held, and since the taxpayer introduced no evidence to show a specific intent with respect to the properties sold during the years in question, the Tax Court correctly concluded that the properties were being held "primarily" for sale to others within the meaning of the statutes.

The case presents no broad question of general importance, as is asserted (Pet. 6–7), but involves essentially a factual situation, and any decision would necessarily be restricted to the particular facts presented. In *Higgins* v. *Commissioner*, 312 U. S. 212, 217, this Court pointed out that such a question "requires an examination of

the facts in each case." See also *Oliver* v. *Commissioner,* 138 F. 2d 910 (C. C. A. 4th); *Ehrman* v. *Commissioner,* 120 F. 2d 607 (C. C. A. 9th), certiorari denied, 314 U. S. 668; *Commissioner* v. *Boeing,* 106 F. 2d 305 (C. C. A. 9th), certiorari denied, 308 U. S. 619.

The taxpayer attacks (Pet. 8) the assumption of the court below that he was admittedly engaged in the business of buying and selling oil properties. Without going into the intended scope of the taxpayer's admission in this respect (R. 60), it seems sufficient to point out that the Tax Court specifically (R. 42) held that the taxpayer's activities in acquiring and selling oil properties "constituted a trade or business in the years in question." In the final analysis, what the court below did was to rule that this and other findings of the Tax Court were warranted by the evidence (R. 102).

Cases such as *Taylor* v. *Commissioner,* 76 F. 2d 904 (C. C. A. 2d) (Pet. 8), involving repeated purchases and sales of securities by a practicing attorney, present no basis for the writ. In *Higgins* v. *Commissioner, supra,* this Court sustained the view of the Commissioner and both tribunals below that personal investment activities in securities did not satisfy the statutory concept, although similar activities in handling, renting and selling realty had been conceded (p. 218) to constitute a business.

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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